

# AD CHALLENGE PROGRAM

## *HOME FURNISHING AND COMPARATIVE ADVERTISING GUIDELINES FOR MICHIGAN RETAILERS*



**MICHIGAN CHAPTER OF HOME FURNISHING ASSOCIATION**

**MICHIGAN DEPARTMENT OF ATTORNEY GENERAL**

**BETTER BUSINESS BUREAUS OF WESTERN & EASTERN MICHIGAN**

Effective: September 9, 2002

These Guidelines are intended to operate as a "self-regulating" program. The program will be monitored by the Better Business Bureaus who will administer the ad challenge program. The Michigan Department of Attorney General will be responsible for enforcement, as appropriate. These advertising guidelines have been adopted to improve consumer confidence and truth-in-advertising within the Michigan home furnishings industry.

# **Percent Off, Fractional Discount, and Dollar Off Sales**

## **Executive Summary or “Guidelines at a Glance”**

An ORIGINAL SELLING PRICE (OSP) may be established by one of two methods

- Offer Method — Seller openly and actively offers the advertised merchandise at “regular price” for a minimum of 14 days prior to each sale and 14 days after each sale. The “sale pricing period” between the 14-day periods may only be for a maximum of 28 days.
- Sale Method — 20% or more of the retailer’s actual unit sales of a particular item during at least one 30-day period within the prior 90-day period.

OSP pricing must meet either; the 14 days criteria or the 20% criteria.

Other Requirements:

- All items must be tagged with OSP pricing at all times.
- Manufacturers Suggested Retail Pricing (MSRP) is not a proper OSP unless established by the Offer or Sale Method.
- If items are sold as “clearance or close out” specials, no new stock may be ordered or sold.
- Damaged goods must be clearly marked and clearly disclose where the damage is on the item.
- Mattresses, box springs and all bedding categories are included in these advertising guidelines.

## **Percent Off, Fractional Discount, and Dollar Off Sales**

*The intent of these guidelines is to ensure that comparative prices and savings claims used in advertisements provide accurate information and meaningful guidance to consumers, and to diminish misleading or deceptive advertising based on arbitrary or inflated price comparisons.*

### **Definitions**

**Substantial Number of Sales:** 20% or more of the retailer's actual unit sales of a particular item, or reasonably identical merchandise as hereunder defined, during at least one 30-day period within the prior 90-day period.

**Reasonably Identical Merchandise:** The same manufacturer brand; collection/group; style/piece; and grade/finish.

**Substantially Similar Merchandise:** The same style/design; size/scale; and grade/quality.

**Market Area:** The geographic area where the seller's retail stores are located, where the seller's advertisements are disseminated, or the predominant location of the residences of those customers to whom the advertisements are directed.

**Significant Period of Time:** A minimum 14-day period immediately preceding an advertised comparative price promotion followed by a minimum 14-day period immediately after the same promotion. Comparative sale pricing is limited to a maximum 28-day period.

**Openly and actively offering.** Includes tagging the product for sale at the OSP, devoting reasonable display space to the product at a majority of the seller's retail outlets and maintaining reasonable inventory during the OSP period, and advertising the product at the OSP.

## **Establishing an Original Sales Price**

- I. The retailer is responsible for establishing a bona fide Original Selling Price (OSP). An OSP may be established by one of two methods:

### **A. Offer Method**

The actual, good faith price at which the seller openly and actively offered the merchandise to the public on a regular basis for a Significant Period of Time in the recent, regular course of business, with the intent to sell the product at that price.

*Example 1: OSP established if*

- *Retailer offers Living Room Set for regular price of \$1,000.00 from July 1, 2003, through July 14, 2003.*
- *Retailer offers Living Room Set for 30% off (\$700.00) from July 15, 2003, through August 11, 2003.*
- *Retailer offers Living Room Set regular price for \$1,000.00 from August 12, 2003, through August 25, 2003.*

*Example 2: OSP established if*

- *Retailer offers Dining Room Set for regular price of \$2,000.00 from January 1, 2003, through January 14, 2003.*
- *Retailer offers Dining Room Set for 40% off (\$1,200.00) from January 15, 2003, through January 28, 2003.*
- *Retailer offers Dining Room Set regular price for \$2,000.00 from January 29, 2003, through February 11, 2003.*

**B. Sale Method**

The price at which the seller made a Substantial Number of Sales of the merchandise in the recent, regular course of business.

*Examples: OSP established if*

- *Retailer sells thirty (30) units in 90-day period; ten (10) units in 30-day period with at least two (2) units sold at regular price within same 30-day period; or*
- *Retailer sells one hundred (100) units in 90-day period; twenty (20) units in 30-day period with at least four (4) units sold at regular price within same 30-day period.*

**II. The OSP established by the retailer may also be based on the following:**

- A. The price at which the same, or Reasonably Identical Merchandise was openly and actively offered and actually sold by the retailer, or others in the Market Area within the previous 90 days;**

**or in the event the same manufacturer brand is not carried in the Market Area**

- B. The price at which Substantially Similar Merchandise was openly and actively offered and actually sold by the retailer, or others in the Market Area within the previous 90 days.

**III. Summary of Pricing Rules.** A percentage/fractional discount or dollar off savings must represent a reduction in price from a bona fide OSP.

- A. A seller may advertise a price reduction or savings by comparing its selling price with the following:

- 1. The seller's own OSP if it is a bona fide OSP; or
- 2. The current selling price of the same, or Reasonably Identical Merchandise or Substantially Similar Merchandise being openly and actively offered by other retailers in the Market Area.

- B. A dealer may not advertise a percentage/fractional discount and/or dollar saving unless it has offered the merchandise at the OSP for a Significant Period of Time or has actually made a Substantial Number Of Sales at the OSP, or can be compared to other retailers' Reasonably Identical Merchandise or Substantially Similar Merchandise. New product cannot be advertised with a comparative price until a bona fide OSP is established.

- C. An OSP is presumptively bona fide if a Substantial Number of Sales of an item were made at the OSP in its recent, regular course of business. An OSP for an item that has not resulted in a Substantial Number Of Sales at the OSP is not a bona fide OSP and cannot be used as a comparative price, unless the item has been openly and actively offered at the OSP for a Significant Period of Time, or can be compared to other retailers' Reasonably Identical Merchandise or Substantially Similar Merchandise. If 20% or more of the unit sales are at the OSP within such a time period then that is a presumptively bona fide OSP.

**IV. Fictitious and Misleading Comparison Prices — Other Rules:**

- A. A fictitious or misleading price is an advertised price that reflects a reduction from a price that

- 1. has never been legitimately offered at an OSP, or has never resulted in a Substantial Number of Sales;
- 2. is used or is created to be used as a reference by which a sale price is made to appear as a greater reduction in price;

3. is used for a short period of time for the purpose of subsequently offering a reduction.
  - B. An advertised percentage/fractional discount and/or dollar savings may not be determined from any Manufacturers Suggested Retail Price (MSRP) unless the MSRP has been established as a bona fide OSP.
- V. **Clearance and Close Out Merchandise.** Clearance and Close Out Merchandise can be advertised at a discount off OSP until all inventory is exhausted, and without proof of sale at an OSP, provided retailer meets the following requirements:
- A. Merchandise is clearly identified on the floor and in advertisements as clearance or close out items.
  - B. No reorders are placed on clearance or close out merchandise after the initial markdowns are taken.
  - C. Damaged merchandise may be offered as clearance merchandise at any time provided the damaged goods are clearly marked and conspicuously marked and disclose where the damage is on the item.

## VI. Other Promotions

- A. “We’ll Pay Your Sales Tax” – It is permissible to use this as a sale promotion provided the sales tax reduction is stated as a separate offering (i.e. Save 10% plus We’ll Pay Your Sales Tax). A representation of “No Sales Tax” or similar representation is prohibited. All conditions and disclaimers of sales tax offers must be clearly and conspicuously disclosed.
- B. “No Payments X Months” — All terms, conditions and disclaimers of financing offers must be clearly and conspicuously disclosed.
- C. Take an Extra \$50 or an extra 10% off - with this Coupon” — This is permissible as long as all price comparative requirements are met and all time periods, dates and other conditions and disclaimers are clearly and conspicuously disclosed.

## **Responsibility for Monitoring and Enforcing the Guidelines**

### **The Retailer**

1. The retailer is responsible for price tagging all items offered in the store at OSP prices.
2. The retailer is responsible for content of all advertising, at all times, whether in print, audio, or video formats.
3. The retailer is responsible for keeping advertising records for proof of compliance regarding each item being 'off sale' and offered at OSP for the appropriate period. Advertising records proof must be made available to the BBB on request.
4. A 'chronological' tear sheet or tape copy of all advertising must be kept for a rolling 180-day period. Additionally, either a manual or computer based record of all sales days must be maintained.
5. In accordance with Section 8 of the Michigan Pricing and Advertising of Consumer Items Act, MCL 445.358 and Section 4(b) of the Michigan Consumer Protection Act, ad agencies, publishers, and media are not responsible for errors in violating these guidelines, absent special circumstances. Retailers need to "proof" all ads prior to publication.
6. All records of sales should be kept for at least three (3) years.

### **The Better Business Bureaus**

1. The BBB office responsible for the service area in question will monitor Home Furnishing advertising and accept all consumer or business generated complaints and 'challenges' for advertising on companies headquartered in the BBB's Michigan service area.
2. BBBs will process the advertising complaint/challenge and review in accordance to these comparative advertising guidelines. Repeated violations by the same retailer will be forwarded to the Michigan Department of Attorney General for potential legal action. Information concerning retailers who do not respond to the BBB will also be forwarded to the Michigan Department of Attorney General.

3. BBB's "Internal Procedure" for Home Furnishing Advertising Review:

- a) BBBs will send a **1<sup>st</sup> letter** to the retailer noting the alleged HF advertising being challenged and request proof in writing that the retailer agrees to modify, discontinue, or substantiate/prove the advertising. Written response to BBB needed in ten (10) days.
  - b) **2<sup>nd</sup> letter** sent if not responded to within ten (10) days informing the advertiser that a written response needed within five (5) more days or the ad challenge will be sent to the BBB / FURNITURE RETAILERS ADVERTISING PANEL (FRAP)<sup>1</sup> for an advertising arbitration hearing.
  - c) **Hearing** will be scheduled within fifteen (15) more days. Retailer must appear at FRAP hearing or an automatic, "in violation" decision will be rendered. Any violation sent to FRAP panel will incur a 'hearing fee' of \$200.00 payable to the BBB for expenses.
  - d) **FRAP hearing decision** will be rendered within seven (7) days and sent to Michigan Department of Attorney General; failure to comply with hearing decision will result in entire file being sent to Michigan Department of Attorney General for legal action.
4. Either the BBB or the Michigan Department of Attorney General may "shop" or survey retailers without notice and without identifying themselves as needed to monitor in-store pricing activity. The BBB may review the in store advertising records for proof of compliance.
5. Each BBB will maintain a Home Furnishings 'ADVERTISING LOG' for all complaints and violations reported to them. This 'log' will be shared with the Michigan Department of Attorney General, other BBBs, and the Home Furnishing Association on a regular basis.

**The Michigan Department of Attorney General**

1. Michigan Department of Attorney General, Consumer Protection Division may administer enforcement actions as appropriate for home furnishings comparative advertising violations in accordance with the Michigan Pricing and Advertising of Consumer Items Act and the Michigan Consumer Protection Act.



2. Michigan Department of Attorney General, Consumer Protection Division may “shop” or survey retailers without notice and without identifying themselves as needed to verify comparative advertising violations. The BBB may review advertising records for proof of compliance.
3. Michigan Department of Attorney General, Consumer Protection Division, in conjunction with the BBBs, shall coordinate an annual review of home furnishing comparative advertising compliance, statistics, and a review or revision of the guidelines with the appropriate parties as needed.
4. The Michigan Department of Attorney General, Consumer Protection Division shall establish a “violation code” within its permanent database for complaints involving comparative advertising.
5. Notwithstanding these Comparative Advertising Guidelines, the Michigan Department of Attorney General, Consumer Protection Division reserves the right, at its discretion, to undertake appropriate enforcement action against home furnishing retailers for any violations of law. The Michigan Department of Attorney General is not under any obligation to utilize the procedures set forth in these Guidelines prior to the commencement of an enforcement action.

**(Footnotes)**

<sup>1</sup> The FRAP shall be comprised of at least 3 persons but shall not include a person from the furniture retail industry.

Total Units Printed:	300
Total Printing Cost:	\$120.55
Total Cost Per Unit:	\$0.400